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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY CHANTHAVONG,

Defendant and Appellant.

C059586

(Super. Ct. No.  
08F00059)

After a jury convicted defendant Johnny Chanthavong of first degree residential burglary and misdemeanor resisting arrest, the court found true an allegation he served a prior prison term for felony vehicle theft.

Defendant appeals, claiming the trial court violated the prohibition against dual use of facts at sentencing. We find no error and affirm the judgment.

BACKGROUND

Given the sole contention on appeal, we need only state briefly the details of defendant's offenses. On New Year's Eve 2007, defendant and a confederate rang the victims' doorbell,

and when they did not answer, broke a bedroom window and attempted to gain entrance. Defendant ran when responding police spotted him a short distance away, and he refused to stop when apprehended.

At sentencing, the court noted that the current offenses constituted a violation of his probation. Defense counsel urged the court to impose the low term, given defendant's youth and because his crimes are "getting less serious" over time.<sup>1</sup> The prosecutor argued instead for imposition of the upper term and "highlight[ed] how persistent [defendant's] criminal activity has been. The defendant was on parole at the time of this offense, and he had only been free from prison custody for six weeks when he committed this offense. [¶] He was released from the prison in -- November 17th of 2007, and committed this offense on December 31st, 2007."

Thereafter, the trial court stated its intention to sentence defendant to the upper term. It "note[d] that [defendant] has a February 2000<sup>[2]</sup> conviction for attempted burglary in the second degree[,] [a]nd although I am using well, I am going to use the prior prison commitment to the extent only

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<sup>1</sup> The probation report shows that defendant has a record of several juvenile adjudications for assault, assault with a deadly weapon, vehicle theft, burglary, receiving stolen property, and escape from the Sacramento County Boys Ranch. His adult convictions include vehicle tampering and attempted auto burglary in February 2006, and vehicle theft in July 2006.

<sup>2</sup> The court misspoke: defendant's attempted burglary conviction occurred in February 2006.

that it was a very recent conviction suffered in July of 2006, and this offense being committed on December 31st, 2007. [¶] So I am going to find that those factors outweigh the mitigating circumstances that warrant the upper term."

The court also ordered defendant to serve a one-year consecutive prison term as a prior prison term enhancement, stating, "I have not used the fact of your prior conviction itself to aggravate your term. I have used the -- I guess I have used it somewhat in terms of it being a very recent conviction as opposed to a remote conviction."

#### DISCUSSION

Defendant contends the court's imposition of the upper term made improper dual use of his prior prison term.

He failed to object at sentencing and has therefore forfeited his claims on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 356; *People v. de Soto* (1997) 54 Cal.App.4th 1, 7-8.) Defendant asserts his failure to object was the result of inadequate assistance of counsel. We disagree.

Generally, a court is prohibited from using a fact both to impose an aggravated term and enhance a sentence. (Pen. Code, § 1170, subd. (b).) However, an objection here would have been futile (see *People v. Price* (1991) 1 Cal.4th 324, 386-387) because the court was *not* making dual use of the fact of defendant's having served a prior prison term. Rather, it effectively, if inartfully, stated a reason sufficient under the statute for its choice to impose the upper term: that defendant's current crime was "very recent," i.e., it followed

close on the heels of his July 2006 conviction for vehicle theft.

In exercising its discretion in selecting among the lower, middle or upper terms of imprisonment, "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court, rule 4.420(b).)<sup>3</sup> Here, although the length of time between a defendant's prior conviction and the current crime is not among the enumerated factors listed in the Rules of Court as circumstances in aggravation (see rule 4.421), the court has discretion to consider any other factor "reasonably related to the sentencing decision" as long as it articulates that factor on the record. (rule 4.420(b); see *People v. Flores* (1981) 115 Cal.App.3d 924, 928.) We conclude from our review of the record that it was not the *fact* of defendant's prior conviction that the court here considered in imposing the upper term, but rather the short lapse of time between defendant's 2006 offense and the present crime. This was not error: a defendant's inability to avoid participating in criminal behavior for a significant period of time after being released from jail or prison is a recognized factor reasonably related to sentencing. For example, courts routinely consider the whether a defendant was on probation or parole when the crime was committed (rule 4.421 (b) (4)). What the court did here was in

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<sup>3</sup> Further rule references are to the California Rules of Court.

the same vein: it looked to the temporal propinquity of the prior conviction to the present offense. (See *People v. Pinon* (1979) 96 Cal.App.3d 904, 911.)

Thus, had defendant's counsel objected to the court's considering the brief lapse of time between his 2006 conviction and his arrest on New Years' Eve 2007, his objection would have been futile, and counsel cannot be considered ineffective for failing to make futile objections.

DISPOSTION

The judgment is affirmed.

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NICHOLSON, J.

We concur:

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SCOTLAND, P. J.

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ROBIE, J.